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IN THE

Supreme Court of the United States

October Term, 1968
No. 1077

RICHARD D. WILLIAMS, Petitioner for writ of Habeas Corpus.

UNITED STATES OF AMERICA, CHARLES M. BERG, Relator,

Petitioners,

vs.

COMMANDING GENERAL (or Commanding Officer) U.S. Army Personnel Center, Oakland Army Terminal, Bldg. 640, Oakland, California,

COMMANDING OFFICER, U.S. Army Personnel Center, Oakland Army Terminal, Bldg. 640, Oakland, California and

SECRETARY OF DEFENSE, and CHIEF CLERK, Local Board No. 8, Lander County, Austin, Nevada,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case on January 21, 1969.

Opinions Below.

The opinion of the Court of Appeals (App. A, *infra,* p. 15) is unreported at this time. The order of the trial judge (App. B, *infra,* pp. 16-17) was entered in the District Court on August 15, 1967.

Jurisdiction.

The District Court had jurisdiction under the provisions of 18 U.S.C. 3231 and 28 U.S.C. 1331, 1355, 1357, and 2241.

The Court of Appeals had jurisdiction to review the order of dismissal pursuant to 28 U.S.C. 1291, 1294,

and 2253, and jurisdiction to hear the matter under 28 U.S.C. 2241.

This Court has jurisdiction to review this matter under 28 U.S.C. 1254.

Questions Presented.

1. Can the United States impose citizenship upon the people of an unconquered nation without their consent and in derogation of a specific treaty, which treaty was subsequently ratified by an Act of Congress?

2. Whether or not a domestic law which expressly affirms a specific treaty, and the treaty itself, can be revoked by the inconsistent provisions of a subsequent domestic law?

3. What is the status of a *traditional* American Indian who has renounced U.S. Citizenship purportedly conferred upon him, or which may in fact have been conferred upon him?

Treaty and Statutes Involved.

Treaty.

Treaty with the Western Shoshoni, 1863 (App. C, *infra,* pp. 18-21).

Constitution.

14th Amend. U.S. Constitution, Section 1 (App. D, *infra,* p. 22).

Statutes.

8 U.S.C. 1401 (App. E, *infra,* p. 23);

25 U.S.C. 71 (App. F, *infra,* p. 24);

50 U.S.C. App. 454(a) (App. G, *infra,* p. 25).

Statement.

"On the first day of October, 1863, at Ruby Valley in the Territory of Nevada, unarmed tribal representatives and armed emissaries of the U.S. Government executed a document entitled a 'Treaty with the Western Shoshoni.' Although this agreement was categorized by a current leader of the Western Shoshone Indian Nation while testifying at the trial being here reviewed as being one of 'peace and friendship,' its origins seemingly belie this designation inasmuch as he further testified that it was written in the blood of a captured member of the tribe whom, in the presence of the assembled Shoshones, U.S. soldiers had killed, cut up, cooked, and forced them to consume, all prior to the drafting and the signing of the treaty. Now, over a century after this sorry segment of history transpired, a descendant of the Shoshone signatories is before us claiming that he cannot be compelled to serve as a member of the very armed force which coerced his ancestors to join them in agreeing to 'peace and friendship.'"

So reads the opening paragraph of the opinion of the Board of Review, United States Army, on February 19, 1968. Petitioner Richard D. Williams (Hereinafter referred to as Williams), a member of the Shoshone Tribe, was inducted into the U.S. Army on January 18, 1967 under protest. On June 20, 1967, Williams caused to be filed in the District Court of the United States for the Northern District of California, Case No. 47278, a PETITION FOR WRIT OF HABEAS CORPUS, a COMPLAINT FOR PERMANENT IN-

JUNCTION, and a MOTION FOR TEMPORARY RESTRAINING ORDER. On June 30, 1967, the matter was heard in the aforementioned court, before the Honorable Alfonso J. Zirpoli, Judge Presiding, after which hearing said judge ordered that the Order to Show Cause be discharged and the Petition and Complaint be dismissed. The next day, on July 1, 1967, Williams was ordered by an officer to report for overseas processing at Oakland Army Base preparatory to boarding an aircraft destined for Vietnam on that date. Williams neither reported for processing nor made the flight.

Williams was subsequently court-martialed and sentenced to a dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for 5 years, and reduction to the grade of Private E-1. His sentence was approved but limited to 3 years at hard labor. On appeal, the Board of Review affirmed both charges and approved the sentence but limited it to 2 years hard labor. On further appeal, the Court of Military Appeals reversed one of the charges in the court-martial and remanded the case to the Board of Review for further sentencing where it is now pending.

On the civil side, Williams appealed to the Ninth Circuit where the decision of the District Court was affirmed. Williams contended that he is not subject to the Universal Military Training and Service Act:

FIRST: because he is a member of the Western Shoshone Nation of Indians and therefore neither a "citizen" nor an "alien" admitted for permanent residence within the meaning of 50 U.S.C. App. 454(a); (App. G, *infra,* p. 25) and SECOND: because he is, in any event, exempt from service with the armed forces of

the United States by virtue of The Treaty of Peace and Friendship of 1863 between the United States and the Western Shoshone (App. C, *infra,* pp. 18-21).

It is apparent from the record on appeal and the Government's brief that there is no issue with reference to the validity of the Treaty. *The Government's position in essence concedes that there is a valid Treaty, that Williams is a descendant of the tribe with whom the treaty was made, and that a reasonable inference to be drawn from the language of the Treaty, custom and usage is that braves (male members) of this tribe would be exempted from compulsory service in any branch of the armies of the United States of America.* The Government states, and the Ninth Circuit agreed, that even if all this is true, both contentions must be rejected on the authority of *Ex Parte Green,* 123 F. 2d 862 (2d Cir. 1941), and also *Albany v. United States,* 152 F. 2d 266 (6th Cir. 1945). Since *Albany* followed the *Green* case our attention need only be directed to the latter. Certiorari was denied in both cases, however it is not without some concern that we note both cases arose during a time of national emergency, namely World War II.

Williams' first contention is the same as that asserted in the *Green* case. It is sincerely believed that if the Court re-examines the *Green* case, a reversal of the same will be in order. Williams' second contention goes one step further than *Green* in that rather than attacking his citizenship status, or regardless of his citizenship status, he is specifically exempted by the implied terms of his Treaty.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

1. It Is Inconsistent With Our Belief in Due Process of Law and Freedom of Choice to Permit Even the United States Government to Arbitrarily Force Citizenship Upon the People of an Unconquered Nation Without Their Consent.

The *Green* case deals with the power of Congress to confer citizenship upon the Indians. It is apparent from the court's decision that they did not believe the Citizenship Act of 1924, 43 Stat. 253, 8 U.S.C.A. 3, forced citizenship upon the Indian since it was entitled "An act to authorize the Secretary of the Interior to issue certificates of citizenship to Indians." (See Senate Report No. 441 and House Report No. 222, 68th Cong., 1st Sess.)

The court in *Green* read the Head Money Cases, *Edye v. Robertson,* (1884) 112 U.S. 580, 5 S. Ct. 247, and followed the principle that where a domestic law conflicts with an earlier treaty, the statute must be honored by the domestic courts in preference to the treaty.

Two issues must be considered: (1) authority and (2) consent. Williams contends that the United States can no more enact a law making citizens of his tribe than they can pass an act making all people in Canada citizens of the United States. Secondly, even if there is some room for the argument that it is within the authority of Congress, there still remains the critical issue of consent. Even a dual national has a free choice. A child of U.S. parents born in Canada, who continuously resides in Canada and chooses Canadian citizenship is not subject to the provisions of 50 U.S.C.

App. 454(a). (App. G, *infra,* p. 25.) Likewise the same applies to a child of Canadian parents who is born in the United States but returns to Canada as an infant, remains there and chooses Canadian citizenship.

Williams contends that he is an Indian, residing in Indian country, land which to this day is unsettled as far as the claim of this tribe of Indians is concerned. That is to say that the lands which were acknowledged as those of the tribe in the Treaty of 1863, and which subsequently became designated as the land of certain States of the United States (mainly Nevada) were never purchased from the Indian and this claim is still pending within the Bureau of Indian Affairs. The members of this tribe have continued their traditional ways and have never consented to U.S. citizenship. It is this issue of free choice which is at stake in this case.

2. There Is a Conflict in the Case Law as to the Citizenship Status of the Indian.

An Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the Government of the United States is not a citizen of the United States within the meaning of the first section of the Fourteenth Article of Amendment of the Constitution of the United States.

Elk v. Wilkins, (1884) 112 U.S. 94, 5 S. Ct. 41.

Since the *Elk* case, the United States Supreme Court has never dealt with the matter of citizenship status of the American Indian. This case has never

been overruled and clearly from this conclusion, the District Court and the Court of Appeals erred in so far as they ruled that Williams was a citizen under the Fourteenth Amendment.

3. This Case Presents the Novel Question of Whether or Not a Domestic Law Which Expressly Affirms a Specific Treaty, and the Treaty Itself, Can Be Revoked by the Inconsistent Provisions of a Subsequent Domestic Law.

Williams contends that the court in the *Green* case failed to consider a vital question when it compared the Treaty with the domestic law, namely the Nationality Act of 1940, 54 Stat. 1137, 1138, 8 U.S.C.A. 501 *et seq.,* (App. E, *infra,* p. 23) and then looked at the Head Money Cases. The latter merely dealt with a domestic law in conflict with an earlier treaty. Both *Green* and the case at bar have an intervening domestic law expressly affirming the specific treaty involved. Specific reference is made to 25 U.S.C. 71 (App. F, *infra,* p. 24), an Act of Congress, a domestic law, which expressly and unequivocally guarantees the validity of all Indian Treaties made prior to March 3, 1871.

It is submitted that this is analogous to a power coupled with an interest becoming irrevocable. Congress no longer has the power to diminish any existing treaty rights and the powers and rights conferred by the Treaty became irrevocable. This is even recognized by

the subsequent language of the Nationality Act of 1940 (App. E, *infra,* p. 23) which indicates

> "Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise effect the right of such person to tribal or other property; . . ."

Clearly any "conferring" of citizenship done or intended by this Act only applied to Indians of Tribes without treaties or treaties entered into subsequent to March 3, 1871. Further, Williams asserts that the right which he acquired as a brave of the Western Shoshone, namely to be free from compulsory induction into the armed forces of the United States, is in fact a *property right,* a real, apparent and existing right which he has inherited and which Congress no longer has the power to extinguish. In addition, it is apparent that Congress was aware of this when they passed the Nationality Act of 1940 (App. E, *infra,* p. 23), for the Act itself protects Williams' tribal and property rights.

Further distinctions can be made between the present matter and the Head Money cases. The Indians were on this continent before the white man, and before there was any "nation" to negotiate any treaties. Where, on the one hand, foreign nations bargain to do business with the United States, and to profit therefrom, on the other hand, we find no similar bargain with the Indians, but a situation where the United States absorbed the Indian by force, or, as in this case, by trick and device. Not only are such methods condemned, but it is hard to believe that this Honorable Court would permit the injustice to continue.

4. This Case Presents an Issue of First Impression Regarding the Status of a "Traditional" American Indian Who Renounces His U.S. Citizenship.

Williams maintains that he, along with the great majority of the Western Band of Shoshone Indians, has consistently renounced his U.S. citizenship and refused to accept any offers of U.S. citizenship. To the best of their ability the tribe refuses any and all government offers of aid or assistance and they reject all attempts to make them abandon their traditional ways or their belief in the Great Spirit. They are basically a peaceful people and have remained so, but they are still prepared to die to maintain their traditional ways. Williams was ordered inducted by his local board, No. 8, Lander County, Austin, Nevada. He refused and was told he would be taken by force if necessary, but if he complied, his rights would be protected in a fair manner.

Even if he was made a citizen, and he forcefully rejects this proposition, he has effectively exercised his right to renounce the U.S. citizenship conferred upon him. Further, it is clear that he is not an "alien" admitted for permanent residence within the meaning of 50 U.S.C. App. 454(a) (App. G, *infra*, p. 25).

There is but one alternative. Williams should be, and is in fact, an aborigine. He has aboriginal rights to remain on his land and to pursue life as a "traditional" American Indian. By "traditional" it is meant the Indian who maintains the old customs and beliefs

of his forefathers. This is voluntary on the part of the Indian, as he is also free to choose the White Man's ways if he so desires, but if he does so, he is no longer considered a "traditional" Indian.

If we are to follow logic, looking at things from a legal view and according to our laws and our system of justice, it is not a strange result to find. It may be that in case of an extreme emergency, that we can resort to the *posse comitatus,* to the British press gang method of grabbing anybody, but such is not the case today, and such should not be the case with Williams.

Conclusion.

The American Indian, and in particular, Williams and the tribe to which he belongs, does not believe that this Court will grant Certiorari because of the basic prejudice that the white man has for the Indian and more important, the fact that the white man is incapable of admitting his mistakes of the past. They are reluctant admittees to the white man's courts because it has been their particular experience that only the white man obtains justice therein. To quote Hollywood, "Me thinks that white man speaks with fork tongue."

The District Court refused to permit the treaty to come into evidence and refused to discuss the issue of renunciation of citizenship. Likewise the Court of Appeals, while at least listening to the arguments and observing the Treaty, affirmed the District Court and

avoided discussion of the issues in its opinion. It is urgently requested that if the belief in justice is to be continued and promoted among the Indian this Court should review this cause.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF
CHARLES M. BERG,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Richard D. Williams, Appellant, vs. United States of America, Appellee, No. 22,323.

[January 21, 1969]

Appeal from the United States District Court for the Northern District of California.

Before: JERTBERG, BROWNING, and CARTER, Circuit Judges.

PER CURIAM:

Appellant contends that he is not subject to the Universal Military Training and Service Act: (1) because he is a member of the Western Shoshone Nation of Indians and therefore neither a "citizen" nor an "alien" admitted for permanent residence within the meaning of 50 U.S.C.App. § 454(a); and (2) because he is, in any event, exempt from service with the armed forces of the United States by virtue of The Treaty of Peace and Friendship of 1863 between the United States and the Western Shoshone. We reject both contentions on the authority of *Ex Parte Green,* 123 F.2d 862 (2d Cir. 1941). *See also Albany v. United States,* 152 F.2d 266 (6th Cir. 1945).

Affirmed.

APPENDIX B.

Order of the Court.

Filed Aug. 15, 1967.

In the United States District Court, for the Northern District of California.

In the Matter of the Petition in behalf of Richard D. Williams, Petitioner, For a Writ of Habeas Corpus.

United States of America, J. B. Tietz, Relator, v. Commanding General (or Commanding Officer) US Army Personnel Center, etc., etc., Respondents. Civil No. 47278.

Appearances:

For Respondents: Cecil F. Poole, United States Attorney. by: Charles Emzer Collett, Chief Asst. US Atty.

For Petitioner: J. B. Tietz.

Before: Hon. Alfonso J. Zirpoli, Judge.

ORDER OF THE COURT

THE COURT: In his petition for writ of habeas corpus and complaint for permanent injunction Richard D. Williams alleges that he is neither a citizen of the United States nor a resident alien, but is a member of the Western Shoshone Nation of Indians, and that as such Treaty Indian, by reason of birth and unbroken association, adhering to his hereditary and aboriginal rights, he is not subject to the military conscription laws of the United States and that his induction into the Army by virtue of an order of a local draft board at Battle Mountain, Nevada, and the subsequent mili-

tary order to report to the named respondents in Oakland, California are therefore illegal.

He further alleges that he does not advance any additional grounds in support of his petition because he brings this action as a test of his treaty rights.

The motion of respondents to dismiss the petition and complaint for failure to state a claim upon which relief can be granted must be granted and the petition and complaint must be dismissed.

The petitioner is a citizen of the United States. Under the provisions of the 14th Amendment to the Constitution, Section 1 and Title 8 USC Section 1401 (a)(2) and its predecessor section, Section 601 (b) of Title 8 U.S. Code, there can be no doubt that the petitioner is a citizen of the United States, and subject to the Universal Military Training Service Act.

See

Ex Parte Green
123 F.2d 862

Albany v. U.S.
152 F.2d 266

Totus v. U. S.
39 F.Supp. 7

U.S. v. Claus
63 F.Supp. 433

The order to show cause heretofore issued is discharged, and the petition and complaint is dismissed.

/s/ Alfonso J. Zirpoli
Alfonso J. Zirpoli
United States District Judge

Dated: Aug. 15, 1967

APPENDIX C.

Treaty With the Western Shoshoni, 1863.

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A. D. one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

Article 1.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

Article 2.

The several routes of travel through the Shoshone country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for mail or telegraph companies.

Article 3.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employes of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

Article 4.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

Article 5.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

Article 6.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

Article 7.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes,

as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

Article 8.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

James W. Nye.
James Duane Doty.

Te-moak, his x mark.
Mo-ho-a.
Kirk-weedgwa, his x mark.
To-nag, his x mark.
To-so-wee-so-op, his x mark.
Sow-er-e-gah, his x mark.
Po-on-go-sah, his x mark.
Par-a-woat-ze, his x mark.
Ga-ha-dier, his x mark.
Ko-ro-kout-ze, his x mark.
Pon-ge-mah, his x mark.
Buck, his x mark.

Witnesses:

J. B. Moore, lieutenant-colonel Third Infantry California Volunteers.
Jacob T. Lockhart, Indian agent Nevada Territory.
Henry Butterfield, interpreter.

APPENDIX D.

14th AMENDMENT to the UNITED STATES CONSTITUTION, §1, provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX E.

Relevant Provisions of Nationality Act 1940.

Title 8, United States Code §1401, provides in pertinent part:

> "Nationals and citizens of United States at birth.
>
> (a) The following shall be nationals and citizens of the United States at birth: .....
>
> (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise effect the right of such person to tribal or other property; ....."

APPENDIX F.

Relevant Intervening Act of Congress.

Title 25, United States Code §71, provides:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." R.S. §2079 [Act Mar. 3, 1871, c. 120, §1, 16 Stat.566]

APPENDIX G.

Relevant Portions of the Universal Military Training and Service Act.

50 U.S.C. App. § 454. Persons Liable for Training and Service.

(a) *Age limits; training in National Security Training Corps; physical and mental fitness; adequate training facilities; assignment to stations and units; training period; medical specialist categories*

Except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], every male citizen of the United States and every male alien admitted for permanent residence, who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [Section 456(h) of this Appendix], shall be liable for training and service in the Armed Forces of the United States.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1077

RICHARD D. WILLIAMS, PETITIONER

v.

COMMANDING GENERAL, U. S. ARMY PERSONNEL CENTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1969. The petition for a writ of certiorari was filed on February 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was entitled to be released from the army by virtue of a treaty with the Western Shoshonee Nation of Indians in 1863 allegedly exempting the members of such Nation from compulsory military service, although subsequent Congressional legislation clearly imposed the obligations of military service on "every male citizen of the United States" between the ages of eighteen and twenty-six, and citizenship was conferred upon members of the Indian tribes by Act of Congress in 1940.

STATEMENT

After being inducted into the army pursuant to the order of his local Selective Service board in Battle Mountain, Nevada, petitioner, a member of the Western Shoshonee Nation of Indians, commenced the present habeas corpus action in the United States District Court for the Northern District of California. He contended that he was entitled to be released from the army by virtue of a treaty concluded between the United States and the Western Shoshonee Nation in 1863.[1] The district court denied relief (Pet. App. B), and the court of appeals affirmed *per curiam* (Pet. App. A).

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[1] During the pendency of the present habeas corpus action, petitioner was convicted by a general court-martial for refusal to obey the order of his superior to report to the Oakland Army Base preparatory to transfer with his unit to Vietnam. That conviction, which is presently pending in the military courts, is not involved in the present litigation.

ARGUMENT

The 1863 treaty with the Western Shoshonee Nation relied upon by petitioner (18 Stat. 689 *et seq.*) is set forth at Pet. App. C. It seems clear from the terms of that treaty that no exemption from compulsory military service was extended thereby to the members of the Western Shoshonee Tribe.[2]

The courts below held that, even assuming that such an exemption had been granted, any such provisions of the 1863 treaty had been superseded by subsequent Acts of Congress. These holdings were correct. *Ex Parte Green*, 123 F. 2d 862 (C.A. 2), certiorari denied, *sub nom.*, *Green* v. *McLaren*, 316 U.S. 668; *Totus* v. *United States*, 39 F. Supp. 7 (E.D. Wash.); see also *Albany* v. *United States*, 152 F. 2d 266 (C.A. 6); *United States* v. *Claus*, 63 F. Supp. 433 (W.D. N.Y.).

Congress provided in the Selective Training and Service Act of 1940 that "every male citizen of the United States" [between the age limits fixed by Congress and except as otherwise provided by the Act] "shall be liable for training and service in the land or naval forces of the United States." 54 Stat. 885 (carried forward without substantive change in the present Universal Military Training and Service Act, 50 U.S.C. App. 454(a)). In the same year, Congress enacted the Nationality Act of 1940, which

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[2] Nor did the government "concede" the contrary, as petitioner asserts (Pet. 7). The government's argument below merely assumed, *arguendo*, that the treaty conferred such an exemption. See page 4 of the government's brief in the court of appeals, a copy of which is part of the record on file with the Clerk of this Court.

in pertinent part provided (54 Stat. 1138, now 8 U.S.C. 1401(a)(2)):

> The following shall be nationals and citizens of the United States at birth: * * *
>
> (b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, that the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property * * *.

As the court stated in *Ex Parte Green, supra*, (123 F. 2d at 864), "the 1940 statute unequivocally made [petitioner] a citizen." The intent of Congress to impose the usual obligations of citizenship on members of the Indian tribes is clear from the fact that it expressly excepted only "the right of such person to tribal or other property." *Ibid.* The right which petitioner allegedly acquired as a brave of the Western Shoshonee Nation to be free from compulsory induction into the armed forces of the United States is not a "property" right; it cannot be transferred or exchanged. If it ever existed, it was not "property" but a purely personal right.

While not disputing the long established doctrine that subsequent Acts of Congress supersede (as a matter of domestic law) rights previously granted by treaty,[3] petitioner argues that Congress by Act of

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[3] See, *e.g.*, *The Cherokee Tobacco*, 11 Wall. 616; *Head-Money Cases*, 112 U.S. 580, 597-599; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 699; *Sanchez* v. *United States*, 216 U.S. 167; *Moser* v. *United States*, 341 U.S. 41, 45; *Hijo* v. *United States*, 194 U.S. 315; *Chae Chan Ping* v. *United States*, 130 U.S. 581, 600.

March 3, 1871 (set forth at Pet. App. F) reconfirmed "any treaty lawfully made and ratified with any * * * Indian nation or tribe prior to" the effective date of the statute. Petitioner argues (Pet. 10-11) that the 1871 Act granted by the treaty made the rights with the Western Shoshonee in 1863 "irrevocable." But the fact that Congress chooses to re-enact or reconfirm rights granted by prior legislation or treaties does not affect the power of a subsequent Congress, by passage of a statute inconsistent with those provisions, to supersede them.

Petitioner also contends (Pet. 8-9) that the Nationality Act of 1940 purporting to bestow citizenship on all the members of the Indian nations was invalid because it did not require the consent of the Indians. Congress, however, does not need to obtain the consent of persons living within the territories of the United States in order to make them citizens. The power to confer citizenship on inhabitants within the territorial boundaries of a nation is inherent in the very concept of sovereignty. See *Boyd* v. *Nebraska*, 143 U.S. 135, 162, 170.[4] *Elk* v. *Wilkins*, 112 U.S. 94, cited by petitioner, is not in conflict with these views. That case held only that the Fourteenth Amendment—which states that all "persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States"—did not operate to bestow citizenship on members of the Indian nations.

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[4] Prior to the Nationality Act of 1940, Congress had conferred citizenship on various tribes or classes of Indians without reference to consent. See 24 Stat. 388, 390 (Act of February 8, 1887).

The Court held that the words "subject to the jurisdiction thereof" meant "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance" (112 U.S. at 102). It ruled that this provision did not apply to Indian tribes by virtue of their quasi-sovereign status. The Court, however, specifically recognized (*id.* at 101, 103-106) that Congress had the power to confer citizenship on members of the Indian nations.

Petitioner argues, finally, that if the Nationality Act of 1940 made him a citizen, he has effectively renounced that citizenship by adhering to tribal traditions and refusing government offers of financial assistance (Pet. 12). Such conduct is, however, not sufficient to bring about the loss of petitioner's United States citizenship within the terms of Congressional legislation specifically and exclusively detailing the ways in which such citizenship may be abandoned. 8 U.S.C. 1481; see also *Kawakita* v. *United States*, 343 U.S. 717.

In sum the courts below properly held that, whatever the rights granted to petitioner under the 1863 treaty, Congress has by superseding legislation plainly evinced its intent that petitioner and other members of the Indian nations be subject to the Selective Service laws and to conscription as are other citizens. *Ex Parte Green*, 123 F. 2d 862 (C.A. 2), certiorari denied *sub nom.*, *Green* v. *McLaren*, 316 U.S. 668.

CONCLUSION

The petition for a writ of certiorari should be denied.

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